

1411516 (Migration) [2015] AATA 3006 (2 July 2015)

1.

DECISION RECORD

APPLICANTS:

Mr Rohit Sharma
Mrs Seema Rani Sharma
Master Rehan Sharma

MRT CASE NUMBER:

1411516

DIBP REFERENCE(S):

BCC2013/55367

TRIBUNAL MEMBER:

Adrian Ho

DATE:

2 July 2015

PLACE OF DECISION:

Melbourne

DECISION:

The Tribunal remits the applications for Skilled Independent (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 189 - Skilled - Independent visas:

- Public Interest Criterion 4020 for the purposes of cl.189.215(1) of Schedule 2 to the Regulations.

Statement made on 02 July 2015 at 1:35pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 June 2014 to refuse to grant the applicants Skilled Independent (Permanent) visas under s.65 of the *Migration Act 1958* (the Act).
3. The applicants applied for the visas on 12 April 2013. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.189.215(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) which requires that Public Interest Criterion 4020 (PIC 4020) is met.
4. The applicants appeared before the Tribunal on 30 June 2015 to give evidence and present arguments.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.189.215(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
7. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

8. The term ‘information that is false or misleading in a material particular’ is defined in cl.4020(5) and the term ‘bogus document’ is defined in s.97 of the Act (see the attachment to this decision). In contrast to the definition of ‘information that is false or misleading in a material particular’ in cl.4020(5), the reference in s.97 to a document that was obtained because of a ‘false or misleading’ statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.
9. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
10. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

11. Background

12. The Department has provided to the tribunal several work references from Miracle Systems, Punjab, India given to it by the applicant (from f.194) (the work references).
13. In the first work reference (f.194) a Manish Kashyap (Kashyap) writes that Rohit Sharma worked for the business as a Skilled General Electronic Instrument Tradesperson from June 2005 to May 2008 and from June 2008 to July 2009.
14. In the second (f.191), it is certified that the applicant was a part time electronic engineer from April 2005 to May 2008. At hearing the applicant confirmed the work hours and times written in the reference and indicated that he worked around 27 hours a week for 1500 Rupees a month.
15. In the third (f.190) it is certified that the applicant was a full time hardware engineer from June 2008 to July 2009. At hearing the applicant confirmed the work hours and times written in the reference and indicated that he worked around 24 hours a week for 3500 Rupees a month.
16. In the copy of the delegate’s decision submitted to the tribunal by the applicant (f.194), the delegate:
 - a. Sets out the reasons for concluding that one or more of the applicant’s work references given to the Department contains false or misleading information;
 - b. Notes that officers from the Australian High Commission in Delhi visited the claimed place of employment and interviewed Kashyap;
 - c. Kashyap told them the business was closed from 2007 to 2010;

- d. Kashyap told them he has no staff and he has never hired any staff; although he had had trainees for periods of 3 to 6 months;
 - e. Kashyap told them he had provided references to three individuals and that he provided the applicant with a reference letter;
 - f. He said the letterhead shown to him did not belong to his business, and he appeared not to be aware of its contents of the letter;
 - g. He said the applicant was his friend, who was under training for two months and then worked with him for one year.
17. The applicant answers the challenge that the work references contain false or misleading information by arguing (ff.146, 17):
- a. That the owner only confirmed one year (2008 to 2009) of work because he only worked full time for one year;
 - b. The business has two work sites and Australian Government officers only visited one of the two sites, and not the site where he actually worked;
 - c. That while Kashyap might have stated that the business was not operating between 2007 and 2010, he also stated that the applicant was employed from 2008 to 2009;
 - d. That the delegate misrepresented and manufactured facts in order to support adverse findings against him.

18. Tribunal hearing

- 19. At hearing the applicant was given a summary of the above information and of the requirements of PIC 4020(1) and of the waiver contained in PIC 4020(4). The applicant was given a copy of PIC 4020, and a copy of the definitions of “bogus document” and of “information false or misleading in a material particular”.
- 20. The applicant was informed that the issues were whether the applicant had given information false or misleading in a material particular to a relevant assessing authority, an officer, or the Minister.
- 21. He was given a summary of the definition of “information false or misleading in a material particular” and it was emphasised that any information given that was false or misleading also had to be relevant to at least one of the criteria for the visa that the Minister, or his delegate, could consider; however, the decision need not be made because of the decision.

22. False or misleading

- 23. The applicant was given a summary of the issue of whether any of the three work references contain false or misleading information. It was suggested to him that the statements of Mr Kashyap noted above appeared to be inconsistent with the periods of work noted in the work reference, apart from the part time period before 2007; and his statements also appear to cast doubt on the statements that the applicant was employed for more than one year or was in training for anything more than 2 months.

24. The applicant was invited to comment. He made the following claims:
- a. Kashyap said he was not in a good mood when he was visited and was preoccupied with personal matters;
 - b. One site of the business had been closed down;
 - c. Kashyap has deposed that the business was not closed between 2007 and 2010 and said that he had never said that;
 - d. One side of the business was closed in 2012 – the side where the applicant was working;
 - e. Kashyap meant that he had no external specialised staff – external to his friends and family, and the applicant was a friend – in this sense Kashyap said that he had no staff;
 - f. However, Kashyap had workers, because he said he had trainees and he suggests that he does have staff, because he said he gave references to three staff;
 - g. Australian officers visited the site which the applicant did not work at;
 - h. The applicant's work site was closed down in 2012;
 - i. The site that the officers visited is still open and operational; and
 - j. Kashyap has told the applicant that the Australian officers spoke with another person, perhaps a neighbour, and it was the neighbour who said the business was closed from 2007 – 2010.
25. It was suggested to the applicant that what Kashyap had to say without the chance of preparation might carry more weight than what he has later deposed in his affidavit, when he was fully apprised of the negative consequences that have resulted for the applicant's migration efforts.
26. The applicant said Kashyap did not want to reveal too much about the business to the officers, because he was worried about his business at the time and his personal matters. He said Kashyap kept asking the officers for the purpose of their visit and only at the end did he feel more comfortable giving them information.
27. The applicant said the business did have two business sites, and Google would confirm this.
28. He said that the information provided by him and Kashyap subsequent to his visa refusal is an accurate version of events. He said that some of note of what Kashyap told officers is true, but not in regard to the closure in 2007 to 2010, and it was true that he only 'worked' for one year in the sense that Kashyap did not consider the three years of part time work as employment. He said Kashyap might have said the business was closed from 2007 to 2010, because he had some kind of ongoing court case or legal issues at the time and may have distrusted officers. He said this was his own conjecture as to why Kashyap might have said this, but it was equally possible, as claimed by Kashyap, that he never said the business was closed between 2007 to 2010 at all.

29. He argued that the officers did not start the interview with Kashyap by talking about him; but rather asking questions about the business – which was a sensitive matter for Kashyap, who was distrustful and guarded. He implied that if they had asked Kashyap about him directly, and not about the business, he would have been able to confirm the work claims in the work reference letters.
30. The applicant was informed that if it was decided that he did not meet mandatory primary criteria, then his included family members would not meet mandatory secondary criteria. He said that he understood.
31. The applicant was asked if there was anything else he wished to say on the issues. He said that he had never given false or misleading information.
32. He was asked if there were any circumstances he wished to raise in relation to the waiver explained to him at the outset of the hearing.
33. He said that he had bought a business at Fountain Gate shopping centre. He bought the business, but has only paid \$5000 of the \$90000 purchase price. The problem is that if the applicant departs, his Australian citizen friend is on the lease with the shopping centre and would have to continue paying the outgoings. This friend, Parminder Sani, set up the business but decided he could not run it and was looking to sell it. He said Mr Sani did not enquire into what visa he was on, or whether he had temporary or permanent residence. The contract between them states that if the applicant defaults of paying the purchase price, he will have to work under Mr Sani as an employee and the business may also be able to seize the applicant's assets.
34. It was suggested that if Mr Sani because responsible for the lease, that happened before he sold the business to the applicant and his contractual obligations to the lessor did not appear to constitute compassionate or compelling circumstances.
35. The applicant was asked if there were other circumstances he wished to raise. He said he had a credit card debt with the Commonwealth Bank. It was suggested that the situation as between him and an Australian company did not involve any of the individuals mentioned in PIC 4020(1) and was not relevant to an exercise of the waiver.

36. Findings

37. The skills assessment is not a bogus document
38. The tribunal twice wrote to Engineers Australia, the relevant assessing authority. Engineers Australia confirmed to the tribunal that even if none of the work experience related to the three work reference letters discussed above had taken place, it would still have issued the applicant with the positive skills assessment for the nominated occupation (f.219).
39. Therefore, the skills assessment was not “obtained because of” any statement (whether false, misleading or otherwise) in any of the work reference letters, or any of the other material given to Engineers Australia. Put another way, the causal link between any statement said to be false or misleading and the issuing of the skills assessment does not exist, as is required by the definition of “bogus document” in s.5(1)(c).
40. The skills assessment is not a bogus document by either s.5(1)(a) or (b).

41. Therefore, the skills assessment is not a bogus document as defined in s.5(1).
42. Information false or misleading in a material particular
43. Information is only false or misleading “in a material particular” if it is “relevant to any of the criteria the Minister may consider when making a decision on the application, whether or not the decision is made because of that information”: PIC 4020(5).
44. The question of relevance is not necessarily straightforward. Leaving aside ‘bogus document’, information that is not relevant to a visa criterion is not the concern of PIC 4020; it would appear, because such information does not influence whether the visa criteria are met, and whether the visa will be granted or not.
45. The only criterion the tribunal can identify to which work experience claims outside Australia can be relevant is the criterion requiring the applicant to pass the “points test”.
46. Part 6D.3 of Schedule 6D of the Regulations awards points if the applicant has been employed outside Australia in the nominated occupation or a closely related skilled occupation for at least 36 months in the 10 years before the invitation to apply for the visa.
47. The tribunal does not consider that any claim of past work experience is relevant to the “points test” in Schedule 6D just by virtue of the fact that it is past work experience which is claimed.
48. The tribunal considers that in order to assess the relevance of the information to a criterion for the visa, some deeper appreciation of the information is required. To wit, the relevance of the information can only be assessed when its character is properly appreciated.
49. For example, if the information clearly indicates that the experience was gained outside the 10 year period contemplated, it would appear to have no relevance to the points test and therefore no relevance to a criterion for the visa.
50. Similarly, if experience is claimed in an occupation which is not a specified skilled occupation, it would appear to have no relevance to the points test and therefore no relevance to a criterion for the visa.
51. The three work references in question each contain a job title and some description of the tasks that were performed.
52. The tribunal considers that all of the information contained in the work references should be considered together.
53. Electronics Engineer (ANZSCO 233411) is a specified skilled occupation for the Subclass 189 visa (IMMI 14/048). However, a cursory consideration of the tasks and duties laid out in the work reference for electronic engineer (f.191) reveals without any further enquiry that the actual occupation performed bears no resemblance to that of an ANZSCO electronics engineer¹ which is in ANZSCO Major Group 2: Professionals. Rather the tasks and duties

¹ <http://www.abs.gov.au/ausstats/abs@.nsf/Product+Lookup/EFC27E035C329B7BCA2575DF002DA66C?opendocument>

performed align with Unit Group 3423 Electronics Trades Workers² which is in ANZSCO Major Group 3: Technicians and Trades Workers.

54. 'Hardware Engineer' is not specified as a skilled occupation, and therefore any experience in that occupation is not relevant to Part 6D.3 of Schedule 6D or other parts of the points test, and therefore not relevant to any visa criteria. Similarly, a cursory examination of the tasks and duties in the work reference reveal that they align with Unit Group 3423 Electronics Trades Workers.
55. The closest ANZSCO occupations to that of "Skilled General Electronic Instrument Tradesperson" are those contained in Unit Group 3423 Electronics Trades Workers, three of which are specified skilled occupations (ANZSCO 342313, 342314, 342315): IMMI 14/048. An examination of the tasks and duties in the work reference for Skilled General Electronic Instrument Tradesperson suggests that overall the role aligns with the occupations in Unit Group 3423 Electronics Trades Workers.
56. The nominated occupation of Engineering Technologist exists in ANZSCO Unit Group 2339 Other Engineering Professionals in Minor Group 233 Engineering Professionals in Major Group 2: Professionals.
57. The nominated occupation is a professional occupation, classified by ANZSCO as such. Each of the references reveals on its face that the role claimed to be performed is one of a tradesperson and its tasks and duties, both in ANZSCO and as stated in the reference, bear no resemblance to the nominated occupation, nor to any other professional occupation in the ANZSCO unit group or the minor group to which the nominated occupation belongs.
58. The tribunal has considered all of the information provided in the work references; and not simply the titles of each job which appears in each reference. In this way, the tribunal seeks to gain a fuller appreciation of all the information in the work reference; without needing to or wishes to go behind what is written on the face of the references themselves, and without questioning the veracity of the information presented.
59. On the face of each reference itself, it is clear that the role being performed is not the nominated occupation and is not a closely related skilled occupation. Only time spent working in the nominated occupation or a closely related skilled occupation is relevant to Part 6D.3 and other parts of Schedule 6D. The instances of claimed work experience, on the face of the references themselves, are not relevant to the points test, and therefore not relevant to any visa criteria the Minister may consider.
60. It is true that the tribunal has had to embark on an exercise of characterisation to conclude that the information is not relevant to visa criteria. The tribunal considers that that characterisation is necessary to properly appreciate the nature of the information in the work references. An appreciation of the information is necessary to decide its relevance to visa criteria.
61. In this context, to properly appreciate the information both ANZSCO and the skilled occupation instrument need to be consulted. In the tribunal's view, information is not relevant to the points test just because the information must be appreciated within the structure of ANZSCO, the skilled occupation list and the points test. One cannot decide if

² <http://www.abs.gov.au/ausstats/abs@.nsf/Product+Lookup/1220.0~First+Edition,+Revision+1~Chapter~UNIT+GROUP+3423+Electronics%20Trades%20Workers>

information is relevant to criteria, unless one has a thorough appreciation of the information (that is all of the information in the work reference and not just the job title) and of the criteria (including the requirements of the points test, the list of specified skilled occupations, and the definitions of occupations in ANZSCO).

62. The tribunal emphasises that in this process it has not evaluated the credibility of the information in question, nor rejected or accepted any part of the information. The tribunal has only taken and examined all of the information on the face of the relevant documents, to assess if the information is relevant to visa criteria.
63. In this case, it is clear on the face of the information itself, without looking behind the information and without using extraneous information, that the information in all three work references is not relevant to the points test and it is not relevant to visa criteria in any other way.
64. Applicants for certain visas must meet PIC 4020 because it is made a requirement by the primary or secondary criteria for those visas. A circular argument may be made that any information that is potentially false or misleading is relevant to PIC 4020, and therefore, relevant to the criterion for the visa which engages PIC 4020. If that were the case, where information is considered false or misleading it would always be relevant to at least the criterion engaging PIC 4020. In this case, the addition “in a material particular” and the definition in PIC 4020(5) would have no work to do; they are rendered functionless appendices. The tribunal therefore rejects the notion that information that is relevant to PIC 4020 alone, without being relevant to another requirement for the visa, is information which is relevant to a visa criterion in the sense of PIC 4020(5).
65. For these reasons, the information contained in all three work references is not false or misleading “in a material particular” as defined in PIC 4020(5).
66. On the question of whether the references contain false or misleading statements, the tribunal considers that the information emanating from the officers who interviewed Mr Kashyap carry sufficient probative weight, and contradict central and material portions of the references, to render material parts of the work claims made in the work references false and misleading.
67. Given its conclusions above, the tribunal does not have to finally decide this question.
68. For the reasons above, the tribunal finds that the applicant has not given or caused to be given a bogus document or information false or misleading in a material particular to any of the individuals or entities mentioned in PIC 4020(1).
69. Therefore, the applicant meets cl.4020(1).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(1)?

70. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy cl.4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2AA).

71. There is no evidence that the applicant or any member of the applicant's family unit have previously been refused a visa because of a failure to satisfy PIC 4020(1). The tribunal considers that the visa refusal the subject of this review falls outside the time period contemplated by PIC 4020(2), which ended on the day the decision under review was made. If it were otherwise, PIC 4020(2) would be incapable of being met where PIC 4020(1) was not met. Therefore, PIC 4020(2) is met.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

72. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. No question has been raised as to the applicant's identity and based on the material, including a copy of the applicant's passport, I am satisfied as to the applicant's identity.
73. Therefore, the applicant meets PIC 4020(2A).

74. Has a visa previously been refused on the basis of a failure to satisfy cl.4020(2A)?

75. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).
76. There is no evidence that the applicant or any member of the applicant's family unit have previously been refused a visa because of a failure to satisfy PIC 4020(2A). Therefore, PIC 4020(2B) is met.
77. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.189.215(1).

DECISION

78. The Tribunal remits the applications for Skilled Independent (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 189 - Skilled - Independent visas:
- Public Interest Criterion 4020 for the purposes of cl.189.215(1) of Schedule 2

Adrian Ho
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Note Regulation 1.03 defines bogus document as having the same meaning as in section 97 of the Act.

MIGRATION ACT 1958

5(1) INTERPRETATION

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...